



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2005

Ms. Cynthia Villarreal-Reyna
Section Chief
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714

OR2005-00254

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216660.

The Texas Department of Insurance (the "department") received a request for eight categories of information pertaining to articles 21-49-2b and 5.43 of the Texas Insurance Code, various sections of the Texas Personal Lines Manual, and the meaning of five specified terms. In your letter dated December 7, 2004, you state that the requestor clarified his request by informing the department that he "did not intend to request copies of Chubb Lloyds' Texas Homeowner Tiering Guidelines." Thus, you state that the department withdraws the portion of the request pertaining to Chubb Lloyds' proprietary information. Therefore, the submitted information marked as proprietary for Chubb Lloyds is not responsive to the request for information, and we need not address the applicability of the Public Information Act ("Act") to it. Furthermore, you inform us that you will withhold some responsive information in accordance with a previous determination issued to the department. *See* Open Records Decision No. 640 (1996) (providing that information obtained by department during course of examination is confidential by law); *see also* Open Records Decision No. 673 (2001) (criteria of previous determination regarding specific categories of information). In regard to the remaining responsive information, you claim that it is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code.¹ You also claim that release of some of the responsive information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305,

¹ In your letter to our office dated November 8, 2004, the department withdrew its claims under section 552.101, 552.130, 552.136 and 552.137 of the Government Code.

you state that you have notified the interested third parties of the request and of their opportunity to submit comments to this office.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the department received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department need not release that information in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Next, you note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides as follows:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, you inform us that a portion of the submitted information, which you have marked, is part of a completed administrative action. Thus, the department must release this information, unless it is expressly confidential under other law

² The department notified the following interested third parties: United Services Automobile Association ("USAA"); Chubb Group of Insurance Companies ("Chubb"); Balboa Lloyds Insurance Company ("Balboa"); and Travelers Lloyds Insurance Company ("Travelers").

³ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

or excepted from disclosure under section 552.108.⁴ Sections 552.103, 552.107, and 552.111 are discretionary exceptions under the Act which do not constitute “other law” that makes information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 8 (2002) (section 552.111 is not other law for purposes of section 552.022), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 663 (1999) (governmental body may waive sections 552.103 and 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold this information under section 552.103, 552.107, or 552.111 of the Government Code.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure constitute “other law” for purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). This office has determined that when the attorney-client privilege or work product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is protected under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule of Civil Procedure 192.5 (work product). Open Records Decision Nos. 676 at 5-6 (2002), 677 at 8-9 (2002). Accordingly, we will address your attorney-client and work product privilege arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.

You claim that the information subject to section 552.022 is protected under the attorney work product privilege. For the purpose of section 552.022(a), information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank v.*

⁴ We note that the department does not raise section 552.108.

Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the section 552.022 information constitutes attorney work product. You state that these documents were prepared by the department’s attorneys or their representatives in anticipation of litigation, and that these documents contain the mental impressions, opinions, conclusions, or legal theories of the attorney or attorney’s representative. Based on your representations and our review of the submitted information, we conclude that the department may withhold the section 552.022 information you have marked under Texas Rule of Civil Procedure 192.5.⁵

We now address your claims for the remaining responsive submitted information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for

⁵ As our ruling on this information is dispositive, we do not address your claim under the Texas Rule of Evidence 503.

information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

You state that the department is involved in an administrative action against Allstate before the State Office of Administrative Hearings, Docket Number 454-04-6413.D. It appears that the department was involved in the pending litigation on the date the department received the present request. Furthermore, you contend that the submitted information pertains to the pending litigation. Based on your representations and our review, we agree that section 552.103 is applicable to the submitted responsive information.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its litigation interests by forcing parties to obtain information that relates to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). Thus, if all opposing parties to the pending litigation have seen or had access to, through discovery or otherwise, any of the information at issue, there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, it appears that the opposing party has already seen or had access to some of the submitted e-mails. Accordingly, while most of the information at issue may be withheld under section 552.103, any information that has been previously seen by the opposing party may not be withheld under this exception.⁶

We note that some of the information that has been previously seen by the opposing party contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Thus, the department must withhold these e-mail addresses of members of the public under section 552.137 unless their owners

⁶ We note that the department may no longer withhold any of the information at issue under section 552.103 once litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

have affirmatively consented to their release. *See* Gov't Code § 552.137(b). The remaining information that has been seen by the opposing party must be released.⁷

In summary, the department must withhold the section 552.022 information you have marked pursuant to Texas Rule of Civil Procedure 192.5. The department may withhold any of the remaining responsive submitted information not previously seen by the opposing party pursuant to section 552.103 of the Government Code. The information previously seen by the opposing party, and thus not protected under section 552.103, contains personal e-mail addresses that must be withheld under section 552.137 unless the department has received affirmative consent to release any of these e-mail addresses. The remaining responsive information must be released to the requestor.⁸

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

⁷ We note that you have not raised any other exceptions to disclosure for this information at issue.

⁸ As our ruling is dispositive, we do not address any remaining arguments.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 216660

Enc. Submitted documents

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